Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether intentional and defamatory falsehoods against a group systematically published by a foreign press in the United States would subject the publishers to potential liability for defamation or whether they are "group defamation" protected under the broad interpretation of the First Amendment.

Whether Circuit Court should have applied the "intensity of suspicion test" established by a controlling state intermediate court to decide if the defamatory falsehoods refer to members of a group, and whether Circuit Court's failure to apply such controlling test amounts to a violation of the Due Process Clause under the Constitution.

LIST OF PARTIES

In addition to Friends of Falun Gong, the following persons are also Petitioners: Feng Yuan; Li Li; Janet Xiong; Hanru Zhu; Mela Wu-Malin; Wailing Lam; Xuemei Feng; Yan Liu; Mei Hong; Jianfen Zhou; Ke Li; Zhenmei Xu; Fengching Chang; Qi Zhang; Meimiao Lee; Lianhua Ziu; Shuling Chen; Chaofeng Chang; Derong Zhang; Wei Wu; Quen Sha; Xiuzhi Jiang; Kun Cai; Chunmei Tsoi; Ming Zhai; Tianheng Song; Zhangguo Shi; Fangfang Jiang; Lisa Kei; Chin Ping Cheng; Connie Pan; Yang Li; Wanling Chung; Fungfei Tong; Lankiu Chang; Lai Kwan Lum; Lin Wang; Jianmin Huang; Hong Zhao; Yanqin Xia; Jiaying Jiang; Haiwen Yu; Shihfung Chu; Sheue Dih Wong; Eva T. Xu; Siu Ha Tam; See Chim Lee; Rong Yi; Tze Yuen Chan; Chang Gao; Hui Ling Ko; William Chan; Allan Wu; Yunqin Li; Shi Yin Cheung; Yan Zuo; Xu Kangang; Lorraine Kabacinski; Betty Hunter Beatty; Suzanne Eckler; Hong Xia Jia; Xin Zhao; Sewmeng Lee; Fatping Cheung; Dongmei Li; James Smith; Lan Sing Cheng; Yahong Bai; Ruiqing Li; and Shuhuan Qu.

Defendants, Fan Dongsheng; Lu Zidai; Li Daye; Shan Huaihai; and Yang Huifen, were dropped during the Second Circuit appeal, and are no longer parties to this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Friends of Falun Gong states that it is a not-for-profit organization and does not issue stock.

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Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated September 24, 2003 ..... 8a

OPINIONS BELOW

The district court's opinion (per Amon, D.J.) granting respondents' motion to dismiss is published at 288 F. Supp. 2d 273. The court of appeals signed and entered a summary order affirming the district court's decision on August 9, 2004. The summary order from the court of appeals is not published. *See* Appendices A & B.

STATEMENT OF JURISDICTION

The court of appeals entered its summary order on August 9, 2004. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Falun Gong is a self-improvement practice consisting of five sets of exercises similar to tai-chi or yoga, the fifth set of which is a sitting meditation. The practice also explains the correlation of a person's state of mind and physical health or well-being. In addition to practicing the exercises, individuals who practice Falun Gong seek to improve themselves according to the fundamental values of "Truthfulness, Compassion and Tolerance." *See* C.A. App. A-141 Para. 11. Falun Gong originated in China and was passed down for at least hundreds of years. It was first introduced to the public in 1992, gaining immediate popularity. *Id.* By 1999, statistics show that more than 100 million people in China were practicing Falun Gong, a number surpassing the number of members in the Chinese Communist Party. However, in 1999, the former president of China, Mr. Jiang Zemin, declared Falun Gong to be the "number one enemy of the state," personally ordered the elimination of Falun Gong and mobilized the machinery of the nation (the "Jiang Regime") to carry out the persecution. *See id.* A-26, A-38.

2. Falun Gong was first introduced to New York in or about 1996 and has since received numerous state, city and municipal awards, proclaiming its contributions to local society and recognizing the practitioners' courage and perseverance in the face of extraordinary persecution. C.A. App. A-141 Para. 12. Falun Gong is legal, recognized,

and practiced in more than 60 countries worldwide. From the executive to the legislative branches, the United States has officially condemned the persecution of Falun Gong started by the Jiang Regime. *See id* A-143 Para. 18.[1] The brutal torture and killing of Falun Gong practitioners continue today. Not limited by the border of nations, the Jiang Regime further extends its interference into the United States. Within the United States, particularly in New York, the Jiang Regime carries out its goals of the persecution largely through its control of the Chinese media.

3. The China Press, a newspaper published by respondent Pacific Culture Enterprise, Inc., is a Chinese newspaper in New York directly controlled by China.[2] The China Press "represents the voice and views of China's

1. "The US House of Representatives unanimously passed concurrent resolution H. Con. Res. 218 on Nov. 18 and the US Senate passed concurrent resolution S. Con. Res. 218 on Nov. 19, to urge China to stop its persecution of Falun Gong." Most recently, on October 4, 2004, the US House of Representatives unanimously passed Resolution 304 "Urging the Chinese Government to Cease Its Oppression of Falun Gong Practitioners in the United States and China." The resolution requested the United States President to issue an official public demarche, a formal protest, to China for its repeated violation of the fundamental human rights, the Attorney General to investigate reports that Chinese consular officials in the US have illegally interfered with Falun Gong practitioners and to take appropriate legal course of action, among others.

2. The reference to "China" in this case refers to the China controlled by the Jiang Regime. No allegations are made against the new regime in China headed by Mr. Hu Jintao, but since the Jiang Regime still overshadows Mr. Hu and the articles in question were published when Mr. Jiang Zemin was the president, the head of the communist party and/or the head of the military, the reference to China remains herein.

Communist government". *Id.* A-402. It carries many of the same articles from Xinhua News Agency, the state-run news distributor of China. *Id.* A-409.[3] The China Press is in charge of a continuous campaign to destroy the reputation of Falun Gong practitioners in New York. *Id.* A-383. Para. 10.[4] It published more than 300 articles over three years since the persecution started, an average of one article on Falun Gong in every three days. *Id.* A-159. These articles claim expressly or implicitly that the Falun Gong practitioners are "murderers," "criminals," "immolators," "people with mental illness" and others. *Id.* A-158 to A-360. Many reports conclusively link felonious crimes or unfortunate occurrences with Falun Gong. *Id.* Several articles mention that Falun Gong "caused 1700 deaths." *Id.* A number of the articles called for violent actions against Falun Gong. *Id.* Numerous articles consisted of "facts" provided by China. *Id.* All the "homicides", "immolations", other crimes and illegal actions supporting the conclusions in the reports occur in China and not anywhere else in the world.

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3. From the record below, one article published by Xinhua News Agency provides a glimpse of China's control of The China Press and how China achieves its control of the media through a media certification process. In "Publishing Industry Adopts Job Certification", The China Press issued a joint document with Public Administrations [of China], the Chinese Communist Party Central Committee Propaganda Department, the State Education Commission [of China] and the Ministry of Personnel [of China] to announce the training of presidents and chief editors of publishing houses, chief editors of periodicals, plant directors of designated publishing houses and audio-video copying enterprises, and managers of Xinhua bookstores at the provincial, prefectural and county levels.

4. According to a sworn affidavit in the record made by a former employee of a state-controlled Chinese media, The China Press has no fear in publishing the deliberately falsified materials against Falun Gong or break any laws in the United States because it has the Chinese Communist government as its support. C.A. App A-383.

The China Press' articles on Falun Gong can be categorized into the following general types: (1) inciting reports on the anti-Falun Gong activities held by the Chinese consulate(s) and/or pro-communist organizations in New York or elsewhere, (2) degrading/discrediting reports on Falun Gong's activities in New York (3) republication of articles written by the state-run media of China (i.e. self-immolation, self-mutilation, murders) (4) articles filled with false or unverifiable facts purporting to support the deduction or conclusion reached in the articles. Some of the headlines of the articles published by The China Press are:

"Evil Launched Mass Suicide Again" (*Id.* A-160, A-220)

"Evil Cult Must Not Be Treated Softheartedly" (*Id.* A-161, A-231)

"Attack Evil Cult, Safeguard Human Rights" (*Id.* A-161, A-235)

"Another Death Case By Evil Cult 'Falun Gong' Was Exposed" (*Id.* A-161, A-256)

"Evil Cult Strikes Again, A Beijing Falun Gong Member Kills Father And Wife" (*Id.* A-161, A-266)

"A Beijing 'Falun Gong' Fanatic Goes Mad Kills Father And Wife And Wounds Mother" (published over three days in cross sections) (*Id.* A-161, A-280)

"Another Hard Evidence for Falun Gong Who Only Wishes Disorder" (*Id.* A-161, A-310)

"Strike Hard On Falun Gong" (*Id.* A-162, A-324)

4. Global China Technology Group Ltd., the parent company of respondent Singtao Newspapers New York Ltd. ("STN"), is a partner of Xinhua News Agency and runs Xinhua Online, the electronic publication of Xinhua News Agency. *Id.* A-403. In fact, many of the fabricated news articles were first published on Xinhua Online, or China News Net, and then republished in The China Press. *See id.* A-279 to A-284. STN publishes the newspaper Sing Tao Daily ("STD"). STD is widely distributed in New York. *Id.* A-144 Para. 24.

On September 20, 2001, days after the 9-11 World Trade Center terrorist attack, STD published a full-page article titled "Radical Religions Advocate Destroying the World." *Id.* A-98 to A-101, A-366 to 367. The article mentioned Falun Gong in two places and included one color photograph of Falun Gong practitioners meditating. *Id.* Above the photo, the statement claims that Falun Gong:

> lead[s] people to superstition, delude people into setting themselves alight, and self-mutilation in order to achieve the "consummation" to ascend to heaven.

Id.

In part, the second statement in the article mentions:

> . . . Falun Gong has caused more than 1700 deaths in Mainland China, either from delay of medical treatments or suicidal acts, even self-mutilations, because it is anti-science and anti-society. In January this year on Tiananmen Square, five Falun Gong followers posted [sic] a qigong stance,

> shouted "Falun Dafa is good", then set fire to themselves in an attempted group suicide, which left one dead, four injured. The four injured lost the outward form of a man as a result of burns. CNN TV at the scene filmed the entire course of the incident.[5]

Id.

5. The petitioners brought the original action for defamation in the Supreme Court for the State of New York of Queens County against the respondents Pacific Culture Enterprise, Inc., d/b/a The China Press, and STN to seek redress for their injuries suffered. The petitioners also sought to enjoin the respondents from publishing similar defamatory materials, thus causing further damages. *Id.* A-139.[6] Included

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5. STD's statement about CNN filming the entire event in the article was made after CNN has publicly denied that it had filmed the incident.

6. *See also* Affidavit of Quanbao Wei (C.A. App. A-374 to A-376) (a reader of The China Press and non-practitioner expressed how the articles create a bad image of practitioners in New York; after reading the articles, readers would naturally believe that those who practice Falun Gong are "fanatic(s)" and would "go insane"); Affidavit of Zhang Derong (C.A. App. A-24 to A-25) (after exclaiming that The China Press said Falun Gong is not good and how much they believed the newspaper, several Chinese men yelled and cursed at affiant, and later tried to push and grab her camera; police had to be called); Affidavit of Feng Xuemei (C.A. App. A-26 to 28) (after reading reports about Falun Gong's "homicide" and "self-immolation" in newspapers, two potential employers refused to hire affiant when they discovered that affiant practices Falun Gong); Affidavit of Zhu Lianhua (C.A. App. A-31 to A-32) (people working

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as defendants in the original action are the writers for The China Press: Li Daye, Lu Zidai, and Shan Huaihai. Also included as defendants are the writers/editors for STD: David Mui and Yang Huifen. Petitioners filed an amended complaint shortly after the state court denied the petitioners' request for an order temporarily restraining the defendants from publishing defamatory materials against Falun Gong. The amended complaint added the causes of action for conspiracy to violate civil rights under 42 U.S.C. § 1985(3) and for a civil rights violation under New York State Civil Rights Law

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(Cont'd)

with non-practitioner husband said "better tell [your wife] to stop [practicing Falun Gong], or she will hang herself, or burn herself with gas"; husband beat affiant violently when she refused to stop practicing Falun Gong and police had to be called); Affidavit of Lee Meimiao (C.A. App. A-33 to A-34) (restaurant owner suffering loss of business when frequent customers expressed negative views about her practice of Falun Gong after customers read articles published in the newspapers; many subsequently stopped visiting her restaurant); Affidavit of Chen Zhuli (C.A. App. A-370 to A-371) (artist rejected by community association after the publication of The China Press articles; association expressing the fear that she might become "insane" and "suicidal", therefore bringing disgrace and harm to the association); Affidavit of Lam Wai Ling (C.A. App. A-372 to A-373) (while surrounding and pushing affiant, mob shouted words from headlines and articles of The China Press: "Strike Hard on Falun Gong", "Falun Gong is an evil cult", "drive away evil cult"); Affidavit of Chui-Ping Cheng (C.A. App. A-384 to A-386) (after reading the articles by The China Press "Beijing 'Falun Gong' fanatic goes mad kills father and wife and wounds mother", husband kicked affiant from bed when she refused to give up her practice of Falun Gong); Affidavit of Yan Liu (C.A. App. A-387 to A-390) (after reading the articles in The China Press and STD and knowing affiant biologist practiced Falun Gong, colleagues of biologist expressed that they were upset with Falun Gong and those who practiced Falun Gong, resulting in biologist's emotional and reputational injuries).

§ 40-c. Before the preliminary injunction hearing could be heard in the state court, the defendants removed the case to the District Court for the Eastern District of New York on the basis of federal question jurisdiction over the additional federal statutory conspiracy claim. The district court granted the motions to dismiss from the China Press and STN defendants, and the petitioners appealed the decision of the district court to the United States Court of Appeals for the Second Circuit. *See* Appendix A-B. In a summary order, the court of appeals affirmed the decision of the district court. Appendix B.

REASONS FOR GRANTING THE PETITION

I. The Issue Presented Is Of VITAL Importance And Of Immediate Practical Significance

"[T]he poisonous atmosphere of the easy lie can infect and degrade a whole society." *Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) (Stewart, J., concurring).

Media used in a free world are invaluable tools of knowledge. The First Amendment of the United States Constitution guarantees freedom of speech and freedom of press. This Court has frequently made reference to the notion of the "marketplace of ideas." *See generally McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *F. C. C. v. Pacifica Foundation*, 438 U.S. 726 (1978). With the convenience of modern technology, ease of transportation, and the fact that the nations of the free world and the non-democratic states are more interconnected by economy and other common interests, information travels speedily across borders, all except for information subject to the control of a dictatorship.

In the modern world, the elimination of a dictator's chosen "enemy" takes on a new and unprecedented scope. Media, for him, become the major weapons of poison and destruction. In a dictatorship, media control is necessary to prevent free flow of information that could likely obstruct or expose any plans he has that is against the public will or opinion. If controlled well, media are a deadly double-edged sword. Effective media control by a dictatorship also allows the world to hear or receive information that the dictatorship chooses for the public to hear, allowing for further reinforcement of the dictatorship. Media, thus, become a tremendously powerful tool for a dictatorship to achieve its self-serving end.

In this case, the Jiang Regime controls the respondent newspapers. Falun Gong is Jiang Zemin's chosen "enemy". In addition to publishing falsified articles directly in the newspapers it controls, the Jiang Regime also intentionally feeds the mainstream media in the international community with fabricated information on "Falun Gong." This would allow the regime to minimize any unwelcome third party investigation into the regime's handling of Falun Gong and to minimize any possible support of Falun Gong. Because of its absolute control of information and media inside China, its story on Falun Gong is an easy lie. The poison spreads to an unwary, free country: the United States.[7]

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7. From Hitler's genocide of the Jews to Stalin's elimination of the churches, history has taught us about dictatorships, how they pick their "enemies", often innocent of the crimes the "enemies" are accused of, and how these dictators used their power secured through often surreptitious means to eliminate the "enemies," at all cost to humankind. The extent they would go to and resources devoted to achieve such elimination are enormous. However, with the demand to know the truth and the courage to take responsibility by the humankind while a wide-scale extermination is occurring, many of the atrocities could have been prevented, or, at least, addressed while they are happening.

As it now stands in the United States, group libel law is in a state of disarray and confusion. While claiming protections from the First Amendment, the press run by a dictatorship is not meant to be a democratic forum to exchange or explore ideas, but is used to promote a state agenda by convincing an unknowing populace, even if it means staging facts and fabricating news. These media are not supporters of the marketplace of ideas. They are toxins in the exchange, molesting the press freedom and assailing the community welfare. Because of their unique positions and ties with a powerful dictatorship, they tend to monopolize the marketplace on issues such as Falun Gong.

It is, thus, vitally crucial, and very urgent, for this Court to provide a guidance on whether systematic and intentional lies published against a group by a foreign press in the United States should be subject to the potential liability for defamation in this nation or if the publication of these materials falls under the exceptions of defamation liability under the First Amendment.

II. This Court Has Never Acknowledged The Validity Or Need For A Broad Constitution-Based "Group Defamation" Exception To Liability For Defamation; Such A Requirement Would Unjustifiably Protect Defamers Without Any Correlating Societal Benefit

A broad constitutionally-based "group defamation" exception to liability for defamation will not materially advance any interest protected by the First Amendment but will have a serious devastating effect on the ability of individuals to redress reputational injury caused by the publication of defamatory falsehoods. Defamatory false statements of facts are not protected by the Constitution.

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

Philadelphia Newspapers, Inc., et al. v. Maurice S. Hepps, 475 U.S. 767, 785 (1986), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Reasoning that "uninhibited, robust and wide-open" debates on public issues need to be protected, this Court established that the First Amendment, incorporated by the Fourteenth, validly imposes Constitutional limits on a State's common law of defamation. *New York Times v. Sullivan*, 376 U.S. at 277-279. Liability for defamation was perceived as imposing enough burdens on the press to induce media self-censorship. *Id.* Subsequent to *New York Times v. Sullivan*, this Court established additional Constitutional rules to defamation law, fine-tuning on private figure plaintiffs. *Gertz*, 418 U.S. 323 (a private individual plaintiff must show some level of "fault" to recover any damages, and the level of fault rises to "actual malice" if the plaintiff seeks to recover presumed or punitive damages); *Hepps*, 475 U.S. 767 (a private figure plaintiff is required to prove "falsity" of media defendant's publication on matter of public concern). In applications to private figure plaintiffs, the "fault-falsity" requirements established by this Court in *Gertz-Hepps* make

it unnecessary for this Court to further create a group exception in defamation actions. The mere fact that the entity being defamed is a group should not mechanically disqualify the members of the group who suffered injuries from seeking redress.

The Constitutional limits developed since *New York Times v. Sullivan* increased the victims paying the grand premium of defamatory falsehoods to its justifiable maximum. Insomuch as prior to *New York Times v. Sullivan*, the strict liability nature of defamation law threatened to chill the media from publishing the truth regarding matters of public concern, the current state of group defamation law has moved to the other extreme and threatens to wipe out any safeguards against publishing intentional false information against a group, forcing private individuals as members of the group into completely defenseless positions. Those with real and crippled reputations cannot seek redress in cases against the press, due to the arbitrary, mechanical, and undifferentiated application of the "of and concerning" requirement in a group context. The development of group defamation law has gradually taken away any hope for recovery by a private figure plaintiff, suffering deeply from a defamatory falsehood against the group from which the individual belongs. Adoption of a broad "group defamation" exception to defamation actions could literally destroy the defamation law as it applies to groups if statements laden with factual content and plainly intended and reasonably understood as assertions of fact are given absolute protection under the Constitution.

III. The Circuits Are Uncertain Over The Constitutional Standard To Apply In Group Defamation Cases

A. The Circuits Are Generally Uncertain Whether The Common Law "Of And Concerning" Requirement Is A Constitutional Norm, Which This Court Alone Can Resolve

The Circuit Courts have, in general, refused to allow an individual action for group defamation unless an individual can show that the defamatory material is referring to the individual. The often-used "of and concerning" phrase has been used as a shorthand for the common law rule that "a plaintiff in a defamation case must show that the statement referred to the plaintiff, either explicitly or by implication." *Emerito Estrada Rivera-Isuzu De P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 26 (1st Cir. 2000). In general, to satisfy the rule, one of two tests is employed. The first type is a size-oriented test. When applying the size-oriented test, if the size of the group is beyond a certain number, the bar against recovery is practically absolute, save other unusual circumstances that would warrant an exception. *See also* discussion *infra* Section III.B. The second test is the "intensity of suspicion test." This test discards the narrow focus on the size of the group and focuses more on the circumstances of the situation. *See Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964); *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (1981).

It is unclear if the "of and concerning" test was constitutionally required. In *New York Times v. Sullivan*, this Court stated that "the evidence was constitutionally defective . . . incapable of supporting the jury's finding that the

allegedly libelous statements were made "of and concerning" [the plaintiff]." 376 U.S. at 288. Subsequently, in *Rosenblatt*, this Court found that when jury instructions permitted finding liability merely on the basis of a plaintiff's relationship to the government agency, the management of which was being questioned, it was constitutionally insufficient to indiscriminately find that members of the group could be suspected for being responsible of the conduct of the criticized government since it was tantamount to a demand for recovery based on libel of government. 383 U.S. at 82-83. However, both *New York Times v. Sullivan* and *Rosenblatt* were concerned with libel against governmental activities. At least one Circuit Court has refused to adopt the broad view which generalizes that the "of and concerning" requirement was constitutionally required to protect the press. *Emerito*, 233 F.3d 24 (refusing to accept the broad view concerning the Constitutional protection expressed in the ruling from a California court and in the treatise, Sack & Baron, Libel, Slander, and Related Problems §§ 11.1.4.3, 11.1.8 (2d ed. 1994)). It is not apparent that this Court established in these two cases the "of and concerning" requirement under the Constitution. Only this Court can provide the necessary guidance in this area and resolve this issue.

B. The Circuits Are Uncertain Over The Application Of The "Of And Concerning" Requirement

(1) The Decisions Reflect A Widespread Uncertainty Over Using Arbitrary Group Size As The Determinant Factor

Some Circuit Courts have denied member plaintiff's recovery against the defendants predominantly because of group size. *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850 (8th Cir. 1979); *Michigan United Conservation Clubs v. CBS News*, 665 F.2d 110 (6th Cir. 1981). The cases in which recovery has been allowed usually have involved numbers of 25 or fewer. RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977). For lack of justification in denying redress based on arbitrary numbers, several courts have refused to consider group size as the determinant factor when deciding whether a plaintiff can recover.[8] *Alvord-Polk, Inc. v. F. Schumacher & Co.* 37 F.3d 996 (3d Cir. 1994), *cert. denied sub nom., F. Schumacher & Co. v. Alvord-Polk, Inc.*, 514 U.S. 1063 (1995) (using the size of a group to decide the viability of an individual action is "amorphous and ill-defined."); *Fawcett*, 377 P.2d 42 (there is no "substantial reason why size alone should be conclusive").

One rationale given for using size as a determinant factor in deciding whether an individual plaintiff can recover in a group defamation is that the larger the group the less likely the recipient of the communication will understand the defamatory communication to be referring to a particular member. *See* SACK

8. "[T]he finding of the exact place at which to draw the line between a group small enough to allow individual recovery, and one too large to allow individual recovery, has troubled the courts since the early development of the law concerning group defamation." Note, *Libel and Slander—Defamation of a Group—Civil and Criminal Liability*, 33 OR. L. REV. 68, 69 (1953).

ON DEFAMATION: LIBEL, SLANDER & RELATED PROBS. § 2.9.4. The psychological assumption underlying this rationale lends serious doubts, however. It assumes that the reasonable readers are rational or that readers have adequate information from alternative sources to treat the statements rationally. Yet, the reality is reasonable readers most likely cannot treat the statements rationally when there exists compelling external reasons. In these situations, the defamatory articles may then effectively create the prejudices in the readers' minds. Any defamatory materials published subsequently may further reinforce the prejudices. This reality can occur irrespective of the size of the group. *See Brady*, 445 N.Y.S.2d 786, 788, citing *Group Vilification Reconsidered*, 89 YALE L.J. 308, 311-313.

Another rationale stated for limiting a member's redress in a group defamation is the need to reduce the threat of increased litigation or to avoid opening a floodgate of lawsuits. This reasoning is likewise unpersuasive since it implies group defamation cases are without merits. It focuses narrowly on the fear of increased litigation and loses sight of the larger societal consequences that need to be addressed and balanced. It also does not take into account the fundamental functions and role of the courts. The courts are established to resolve disputes and to provide redress for injuries suffered by those who bring the merits of their cases before the courts. For real injuries that have been suffered, redress is needed and well-principled precedents are necessary to reduce severe social harm. The courts need to provide "socially relevant and rational remedies," which would replace "ideological extremes in which speech is either sanctified or nullified dogmatically."[9] Hence, group defamation cases should not be treated differently from other types of cases.

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9. Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 932 (1995).

Using an arbitrary size to determine whether recovery is allowed or not in a group defamation would encourage defamation against a group above a certain size. This unnecessary loophole in the law allows detrimental consequences to occur. A media controlled by a dictatorship can effectively attribute homicides and fabricate realistic-sounding lies against its targeted group that is larger than a certain size, without being held accountable for any harm to the members of the group, even if the harm was calculated and systematically executed. This trample upon the freedom of press through the poisonous spread of intentional falsifications by the foreign press controlled by a dictatorship should be examined and absolutely forbidden.

(2) The Decisions Reflect A General Uncertainty Over The Application Of The "Other Circumstances" Test

The Third Circuit looked beyond the mere size of the group and found that a statement is "of and concerning" a plaintiff if, by description or circumstances, it tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985), *cert. denied*, 474 U.S. 843 (1985). In New York, a district court held that a publication referring only to a group may be actionable by individual members of that group if it "was reasonably understood [to refer to the plaintiffs] by many of those who read" the publication. *Atlantis Int'l, Ltd. v. Houbigant, Inc.*, 1996 WL 527334, at *5 (S.D.N.Y., Sept. 16, 1996).

When an action involves individual defamation, the Second Circuit held that it is not necessary to prove that the defendant intended his statement to refer to the plaintiff, but that it is enough that the audience could perceive the plaintiff to be implicated by the content of the statement or even by

extrinsic facts. *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980). *See also Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319, 1322 (8th Cir. 1993) (the plaintiff need not be cited by name for the statement to be "of and concerning the plaintiff"; the test is the reasonable understanding of the recipient of the communication); *Golden North Airways, Inc. v. Tanana Publishing Company*, 218 F.2d 612, 621 (9th Cir. 1954) (there is no requirement that the person defamed be mentioned by name; it is sufficient if the publication points to the plaintiff by description or circumstances tend to identify him). One commentator suggested that the court should consider the "nature of the statement, the circumstance under which it was made, and the extent to which it has been published." *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 884 (1956). It has also been well suggested that the publications should be analyzed in light of the cultural values of the community in which it arises and upon which it has an impact. *See* Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 919 (1995).

The various and inconsistent applications of the "other circumstances test" reflect a general lack of certainty in the courts' rationale on how to best balance the freedom guaranteed by the First Amendment and the need to provide a just recourse for undue harm suffered.

IV. The Decision Below Is Incorrect; Circuit Court's Failure To Apply The Standard Established By A Controlling State Intermediate Court Amounts To A Violation Of The Due Process Clause Under The Constitution

A. The Court of Appeals has failed to apply the "intensity of suspicion" test and its rationale established by the state intermediate court

The Second Circuit Court of Appeals held that in order for the petitioners to succeed on the defamation claim, the petitioners "were required to allege a statement by the defendants that was 'of and concerning' individual plaintiffs". Appendix 4a. It further stated that:

> Insofar as the articles refer to a group or class of which a plaintiff is a member, moreover, they would have been "of and concerning" the plaintiff only if the group or class were sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. Neither circumstance obtains here.

Appendix 5a (Internal citations omitted).

The circuit court found that:

> . . . the allegedly defamatory newspaper articles in the instant case do not refer specifically to any of the plaintiffs, instead, they are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not "of and concerning" any of the plaintiffs.

Id.

The Second Circuit offered conclusive comments as the explanation for its decision. Its holding that the articles are not "of and concerning" the plaintiffs simply because the "articles . . . do not refer specifically to any of the plaintiffs" lacks principle and legitimacy, ignoring important laws and facts. It is unclear how the Second Circuit reached its conclusion that the articles do not "refer specifically to" the plaintiffs. Under New York law, the plaintiff does not have to be named in the publication in order to satisfy the "of and concerning" element. *Houbigant, Inc.*, 1996 WL 527334, *3; *New York Times Co. v. Sullivan*, 376 U.S. at 288. Extrinsic facts which are known to those who read or heard the publication may be used to satisfy the "of and concerning" requirement. *Id.* Affidavits from the record show how the readers in the communities where the respondent newspapers were distributed naturally understood the articles to be referring to plaintiffs and that plaintiffs were specifically targeted in the communities because of these articles.[10]

Although the Second Circuit cites *Brady* for its contention that the "of and concerning" element "required that the allegedly defamatory comment refer to the plaintiff", it is unclear how, if at all, the Second Circuit applied the "intensity of suspicion test"[11] explained in *Brady* to determine whether or not a

10. *See supra* note 6.

11. The test was a "flexible approach for balancing the competing interests present in group defamation actions." *Brady*, 445 N.Y.S.2d at 793. It will "prevent vexious actions based on impersonal discussions of matters of public concern without terminating suits on an arbitrary size limitation where real injury is present. *Id.* The court did consider the size of a group, but decided that "size is too narrow a focus to determine the issue of individual application in group defamation". *Id.* at 791-792 "It would also be illogical to afford greater protection to statements causing a greater number of wrongs." *Id.* at 792.

comment refers to the plaintiff. In its test, the *Brady* court considered public perception, whether the increased size is sufficient to dilute the harm, capability that the comment can be applied personally to the individual members of the defamed group, prominence of the group considered within the geographic area of publication and within the context of the allegation's subject matter, and repetition of the charges by the newspaper. None of these factors nor their applications were discussed in the Second Circuit's decision.

B. Second Circuit's failure to apply the "intensity of suspicion" test is inconsistent with the ruling of this Court and seriously violates the Due Process Clause of the Constitution

Instead of applying the "intensity of suspicion test" established by the Second Department of the New York Supreme Court, Appellate Division, the Second Circuit bypassed the state test. The court of appeals only briefly stated the size-oriented rule and concluded that for a group, unless it was small or there existed other circumstances for it to decide otherwise, the articles were not "of and concerning" the petitioners and it concluded in a cursory fashion that the petitioners had no claim for defamation against the respondents. *See* discussion *supra* IV.A.

Second Circuit's decision not to apply the state test is a constitutional error. This Court has held that "an announcement of state law by an intermediate appellate state court must be accepted by federal courts in absence of convincing evidence that law of state is otherwise." *Six Companies of California et al. v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180 (1940), *reh'g denied*, 311 U.S. 730 (Jan. 6. 1941). *See also West et al. v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940)

(the state law required to be applied by federal courts may consist of rules of decision that have never been passed upon by highest court of state). Rather than prescribing a rule different from that used by the appellate division, the Second Circuit must apply the "intensity of suspicion test", even if it may have "departed from prior decisions of federal courts." *Id.*

The Fifth Amendment provides that "[n]o person shall . . . be deprive of . . . life, liberty, or property, without due process of law." For the reasons stated in this petition, the court of appeal's haphazard decision and its failure to apply the appellate division's test inconsistent with the ruling of this Court is a Constitutional error and has violated the Due Process Clause of the Constitution.

C. Any reasonable analysis of the defamatory statements leads to the conclusion that they are referring to the petitioners

Application of the "intensity of suspicion" test would allow the court of appeals to reasonably find that the defamation published by the respondent newspapers refer to the petitioners. By examining the various factors explained by the *Brady* court, court of appeals could reasonably find that the articles are referring to the petitioners.

The distinction that needs to be made is "between a generalization applicable to a class and a specific charge directed at a circumscribed group of individuals." *Brady* at 790-791. "[I]f the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff." *Brady* at 790-791 (internal citations omitted). The possibility

that the defamatory statements will be applied to Falun Gong practitioners worldwide as a whole does not interfere with a finding that the statements are "capable of personal application to the individual members of the defamed group", because since 1999 when the persecution started until the time when the case was brought, the membership of the defamed group had remained "constant and was easily discernable." *Id.* at 794.

The last element under the intensity of suspicion test is the "prominence" of the group. "Prominence . . . must be considered generally within the geographic area of publication or distribution of the defamatory allegation . . . and in the context of the allegation's subject matter." *Id.* at 795. Respondents' newspapers were distributed in the Chinese communities in New York City and these neighborhoods were the "kind of place where people know each other." *Id.* The prominence of the active New York practitioners was intensified, since 1999, throughout the distribution area of the newspapers. The China Press published more than 300 articles against Falun Gong in less than three years. This "compulsive repetition of the charge[s]" by the respondents "gives rise to the inference that [they] had access to special information which would negate the possibility that the charge of misconduct was an inexact generalization." *Id.* Even if some of the articles are found to be written in the form of an "opinion", "accusations of criminal activity, even in the form of opinion, are not constitutionally protected." *Id.* at 796. The rationale underlying this decision is that accusations of criminal behavior are factually laden opinions whose truth or falsity can be tested. *Id.*

Even for the cases that take "size" of the group as the determinant factor, they do not consider "size" to be the sole factor. To do so would be illogical and unjust. The requirement is to also examine the overall and relevant circumstances. In this case, the Jiang Regime tightly controls the media on the topic of Falun Gong. It intentionally falsifies information in an attempt to achieve its purpose of elimination. By being mouthpieces for the Jiang Regime in New York, the respondents purposefully publish the defamatory falsities to create hostility and hatred in the readers' minds against Falun Gong. The result is an effective way of creating hatred in the readers' mind against the Falun Gong practitioners in New York, where these practitioners live, work and have their social interactions. Thus, an attentive inquiry into the nature and extent of the atrocities committed against the group by the dictatorship and a thoughtful examination of the crucial role that the respondent press plays in the larger picture would raise many serious questions and provide a guidance as to the real circumstances underlying the case, allowing the courts to better address a poisonous spread of societal harm.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 9, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03-9156

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of August, two thousand and four.

PRESENT:

HON. ROSEMARY S. POOLER,
HON. ROBERT D. SACK,
HON. REENA RAGGI,

Circuit Judges.

FRIENDS OF FALUN GONG; FENG YAUN; LI LI; JANET XIONG; HANRU ZHU; MELA WU-MALIN; WAILING LAM; XUEMEI FENG; YAN LIU; MEI HONG; JIANFENG ZHOU; KE LI; ZHENMEI XU; FENGCHING CHANG; QI ZHANG; MEIMIAO LEE; LIANHUA ZIU; SHULING CHEN; CHAOFENG CHANG; DERONG ZHANG; WEI WU; QUEN SHA; XIUZHI JIANG; KUN CAI; CHUNMEI TSOI; MING ZHAI; TIANHENG SONG; ZHANGGUO SHI; FANGFANG JIANG; LISA KEI; CHIN PING CHENG; CONNIE PAN; YANG LI; WANLING CHUNG; FUNGFEI TONG; LANKIU CHANG; LAI KWAN LUM; LIN WANG; JIANMIN HUANG; HONG ZHAO; YANQIN XIA; JIAYING JIANG; HAIWEN YU; SHIHFUNG CHU; SHEUE

Appendix A

DIH WONG; EVA T. XU; SIU HA TAM; SEE CHIM LEE; RONG YI; TZE YUEN CHAN; CHANG GAO; HUI LING KO; WILLIAM CHAN; ALLAN WU; YUNQIN LI; SHI YIN CHEUNG; YAN ZUO; XU KANGANG; LORRAINE KABACINSKI; BETTY HUNTER BEATTY; SUZANNE ECKLER; HONG XIA JIA; XIN ZHAO; SEWMENG LEE; FATPING CHEUNG; DONGMEI LI; JAMES SMITH; LAN SING CHENG; YAHONG BAI; RUIQING LI; and SHUHUAN QU,

Plaintiffs-Appellants,

- v. -

PACIFIC CULTURE, d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Defendants-Appellees,

FAN DONGSHENG; LU ZIDAI; LI DAYE; SHAN HUAIHAI; and YANG HUIFEN,

Defendants.

Appeal from a September 26, 2003, judgment of the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, AFFIRMED.

Appendix A

SUMMARY ORDER

The plaintiff Friends of Falun Gong and the individual plaintiffs appeal from the September 26, 2003, judgment of the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*) granting the motion by the defendants China Press, Sing Tao Daily, and David Mui to dismiss the complaint. *See Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 288 F. Supp. 2d 273 (E.D.N.Y. 2003). On appeal, the plaintiffs contend that (1) they properly alleged a claim that the defendants violated 42 U.S.C. § 1985(3), (2) they properly alleged a claim under N.Y. Civ. Rights Law § 40-c, (3) they properly alleged a claim for defamation, (4) they were improperly denied leave to replead, and (5) the district court abused its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims.

We assume, as we must at this juncture, that all the allegations made in the complaint are true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The only question before us is whether, under that assumption and limiting ourselves, as we must, to what is contained in the complaint, the plaintiffs have adequately pleaded a violation of federal or state law. We conclude that they have not.

First, we think that the district court correctly determined that the plaintiffs did not plead a valid cause of action under 42 U.S.C. § 1985(3). The plaintiffs have failed to allege a conspiracy by the defendants either to deprive them of their First Amendment rights or to hinder governmental authorities from securing to them their First Amendment rights.

See Gyadu v. Hartford Ins. Co., 197 F.3d 590 (2d Cir. 1999). Even if N.Y. Civ. Rights Law § 40-c could serve as a predicate for a section 1985(3) violation, the plaintiffs have failed to allege any instances in which the defendants, by publication of the newspaper articles at issue, conspired either to deprive the plaintiffs of their rights under that state statute or to hinder governmental authorities from securing to them their rights under that statute. *See Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 79 N.Y.2d 227, 234, 590 N.E.2d 228, 232, 581 N.Y.S.2d 643, 647 (1992).

Second and similarly, the district court correctly determined that the plaintiffs did not plead a valid cause of action against the defendants under N.Y. Civ. Rights Law § 40-c standing on its own. The plaintiffs did not allege any instances in which a plaintiff was harassed, as defined in N.Y. Penal Law § 240.25, or discriminated against with respect to his or her civil rights, as a result of the defendants' newspaper articles. *See id.*

Third, the district court also correctly concluded that the plaintiffs have no valid defamation claim on the face of their complaint. Defamation law protects only the individual reputations of persons and entities. To succeed on their defamation claim, the plaintiffs were therefore required to allege a statement by the defendants that was "of and concerning" individual plaintiffs. *See Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). This "requires that the allegedly defamatory comment refer to the plaintiff." *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S.2d 786, 788 (2d Dep't 1981) (citation omitted). But the allegedly defamatory newspaper

articles in the instant case do not refer specifically to any of the plaintiffs;* instead, they are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not "of and concerning" any of the plaintiffs. *Cf. Church of Scientology Int'l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1161 (S.D.N.Y. 1992) ("Without more, reference to the activities of individual Scientologists can not create a right of action in [the Church of Scientology]."), *aff'd sub nom. Church of Scientology Int'l v. Behar*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814 (2001). Insofar as the articles refer to a group or class of which a plaintiff is a member, moreover, they would have been "of and concerning" the plaintiff only if the group or class were sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. *See Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002). Neither circumstance obtains here.

Fourth, the district court did not abuse its discretion in denying the plaintiffs leave to replead because they were "unable to demonstrate that [they] would be able to amend [their] complaint in a manner which would survive dismissal." *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999).

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* Two of the articles at issue allegedly include photographs of some of the plaintiffs. The complaint does not make a separate allegation with regard to these photographs. In any event, the publication of the photographs would not affect our analysis because the articles, including the photographs, do not contain anything that is capable of defaming these particular persons, rather than practitioners of Falun Gong generally.

Fifth, the district court did not abuse its discretion in exercising supplemental jurisdiction over the plaintiffs' state-law claims because all of the plaintiffs' federal- and state-law claims are about the defendants' newspaper articles—a common nucleus of operative fact that would ordinarily be expected to be tried in one judicial proceeding. *See New York by Abrams v. Terry*, 45 F.3d 17, 23 n.7 (2d Cir. 1995).

Finally, we note that the plaintiffs assert in their complaint that the articles published by the defendants contain false statements of fact about the plaintiffs that resulted in serious injury to them. Because the defendants asked the district court to dismiss the lawsuit on the basis of the contents of that complaint alone, and the district court did so, we are required to, and do, assume that the factual assertions of falsity and injury are true. The only question before us, then, is whether such alleged facts provide a basis under state or federal law for the specific legal action that the plaintiffs chose to bring. For the reasons stated above, we conclude that they do not.

The plaintiffs, in their complaint, express their disagreement with the sometimes harsh opinions that the defendants allegedly expressed in the articles about Falun Gong and its practitioners. We are foreclosed from making any judgment whatever as to the validity of those opinions, just as we are barred from making similar judgments with respect to the views held by the plaintiffs. We thus do not, by affirming the district court's dismissal of the complaint, make or imply any judgment as to any party's expressed beliefs.

Appendix A

In light of our conclusion, we need not reach the merits of the plaintiffs' other arguments.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

_____ _____

By: Date

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 24, 2003

United States District Court,
E.D. New York.

No. 02 CV 4482 CBA.

Sept. 24, 2003.

FRIENDS OF FALUN GONG, et al.,

Plaintiffs,

v.

PACIFIC CULTURAL ENTERPRISE, INC., et al.,

Defendants.

MEMORANDUM & ORDER

AMON, District Judge.

Plaintiffs, Friends of Falun Gong, a non-profit organization dedicated towards the practice of Falun Dafa, and 67 of its individual members (collectively "plaintiffs" or "Falun Gong") bring this action against Pacific Culture Enterprise, Inc., doing business as *The China Press* ("CP"), and three of its writers and against Sing Tao Newspapers New York Ltd., doing business as *Sing Tao Daily* ("STD"),

and two of its writers/editors[1] (collectively "defendants") alleging a conspiracy to interfere with civil rights and to deprive individuals of legally protected rights or privileges in violation of *42 U.S.C. § 1985(3)*, as well as defamation, defamation per se, and prima facie tort in violation of New York common law, and a violation of *New York Civil Rights Law § 40-c*. Defendants moved to dismiss plaintiffs' complaint in its entirety pursuant to *Fed.R.Civ.P. 12(b)(6)*. For the reasons set forth below, defendants' motion to dismiss is granted.

BACKGROUND

According to the Amended Complaint in this action, Falun Gong is an association of individuals aimed at cultivating physical and spiritual values premised upon principles of truthfulness, compassion, and forbearance, collectively known as "Falun Dafa." (Am.Compl.¶ 11.) The plaintiffs in this action are all part of a sub-group of Falun Gong practitioners in the New York metropolitan area. (*Id.* ¶ 15.) The Amended Complaint alleges that both CP and STD are media outlets owned and/or controlled, either directly or indirectly, by the People's Republic of China ("PRC"). (*Id.* ¶ 26.) Plaintiffs contend that PRC has used both CP and STD to persecute practitioners of Falun Dafa in the United States, and in New York in particular. (*Id.* ¶ 20.) Plaintiffs allege that on or about July 20, 2001, the American Citizen's Anti-Evil-Cult Association ("ACAECA"), a New York based organization whose purpose is to spread

1. The named writers for *The China Press* are Lu Zidai, Li Daye, and Shan Huaihai and the named editors of *Sing Tao Daily* are David Mui and Yang Huifen.

propaganda about Falun Dafa practitioners, was formed with the defendants' full support. (*Id.* ¶¶ 28-29.) It is plaintiffs' contention that the defendants aided ACAECA's efforts to carry out this purpose by publishing a series of articles about plaintiffs. These articles form the basis for plaintiffs' state law claims.

I. *Procedural History*

On April 30, 2002, plaintiffs sought immediate injunctive relief in New York State Supreme Court in an effort to prohibit defendants from publishing further libelous or defamatory articles about the plaintiffs. On June 6, 2002, Justice Duane A. Hart heard plaintiffs' request for injunctive relief and denied such a request, finding "not one iota of evidence" that would justify an injunction against publication. Although Justice Hart denied plaintiffs' relief, he granted plaintiffs the opportunity to submit further evidence to support their position. As a result, plaintiffs obtained new counsel and amended their complaint to include, for the first time, a federal cause of action, which precipitated defendants' removal of this action from state court on August 13, 2002.

Appendix B

II. *Allegedly Defamatory Statements*

Plaintiffs allege that defendant CP made the following statements:

A. *The 2001 Articles*

- "The American government suppresses the public-endangering Davidian Cult and the People's Heavenly Palace Cult but supports Falun, which cruelly hurts Chinese people." (Am.Compl. ¶ 45.)

- "The Falun Gong evil cult is flagrantly detrimental, endangers society, deceives the world to gain fame, and has done many evils." (*Id.* ¶ 30.)

- "[ACAECA] had been formed and . . . was preparing to adopt specific means to prevent the evil cult from harming resident Chinese families and individuals." (*Id.*)

- "The U.S. should adhere to the international standard of behavior and establish an anti-evil-cult law to ban the intolerance and torture caused by evil religious faith." (*Id.* ¶ 31.)

- "The Chinese government's fight with 'Falun Gong' is a battle between righteousness and evil, between science and ignorance. It is what a responsible government, or any responsible government, must do." (*Id.* ¶ 32.)

Appendix B

- "[E]vil cult 'Falun Gong' killed someone for the sake of 'eliminating demons'." (*Id.* ¶ 35.)

- Local Falun Gong practitioners took pleasure in the WTC attacks (*Id.* ¶ 41.)

- Falun Gong practitioners suffer from a "psychological disorder," and readers are encouraged to join the New York Chinese United Federation for a meeting to "denounce Falun Gong" (*Id.* ¶ 51.)

- "After our newspaper and other New York Chinese media reported the news of how a Fujian descent youth, because of practicing Falun Gong, became psychologically disturbed, a few Falun Gong practitioner have begun to harass the people involved." (*Id.* ¶ 53.)

- "Even so, many people still don't understand why Falun Gong induces psychotic syndromes, nor the difference between the psychotic syndromes induced by Falun Gong and other psychopathic diseases. . . . The psychotic syndromes can be categorized into different types: schizophrenic, being easily irascible and depressed, hysteria-like psychotic syndromes, state of being possessed, hallucinatory, being restless and manic, and dogmatic with religious ideas." (*Id.* ¶ 54.)

- An article entitled "Beijing Falun Gong Fanatic Goes Mad Kills Father, Wife, and Injures Mother" described practitioners as having "twisted souls," subject to "mind control," and part of an "evil cult." (*Id.* ¶¶ 57, 60.)

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- "Falun Gong Gathering Outside of Our Gate Making a Scene" (in reference to efforts by Falun Gong practitioners to explain the truth to the paper's publishers). (*Id.* ¶ 63.)

- "[T]he noise from the amplifiers not only disturbed the normal operation of China Press, at the same time they also disturbed the normal work of others working inside the Asian Cultural Building." (*Id.* ¶ 64.)

- "[T]he management personnel from the building said that the protestors tried to break into the building several times, wanting to deliver their *open letter* to China Press's person in charge." (*Id.*)

B. *The 2002 Articles*

- "From the actions of Falun Gong, we see that this is strong evidence for Falun Gong instigating disorder. Falun Gong is not content by just causing disorder in China, came to New York, US, to cause disorder in the Chinese community." (*Id.* ¶¶ 69-70.)

- The Chinese Association Union believed that "the evil cult wanted to poison/confuse people's heart, which will bring bad influence in the Chinese American community." (*Id.* ¶ 71.)

- "There were many factors why the evil cult Falun Gong wreaking havoc hasn't stopped . . . misleading the practitioners to the path of a stubborn

superstition, self-important, demented unconscious, engenders a huge twisted effect to the personality of practitioners, and leads to self-destruction at the end." (*Id.* ¶ 72.)

- The three principles of Falun Gong should be changed to "hatred, shame, and outrage," Falun Gong is an "evil cult," and is similar to the KKK and the Branch Davidians. (*Id.* ¶¶ 74-76.)

C. *Statements by Defendant STD*

Plaintiffs' amended complaint contains only one alleged statement made by defendant STD:

- An article entitled "Radical Religions Advocating the Destruction of the World" stated that local Falun Gong practitioners were "anti-science, anti-society, anti-civilization," "misleading," "misguided," "self-destructive," and "evil" and associated practitioners with terrorists by juxtaposing pictures of Falun Gong practitioners with pictures of WTC attacks (*Id.* ¶¶ 36-39.)

DISCUSSION

Defendants argue that plaintiffs' amended complaint is defective as a matter of law, and therefore, should be dismissed because (i) plaintiffs' federal civil rights conspiracy claim fails to allege a conspiracy, a violation of a protected federal right, or any state action; (ii) plaintiffs' defamation and defamation per se claims rest on publications that are

not "of and concerning" any of the plaintiffs and are devoid of statements of fact; and (iii) plaintiffs' prima facie tort claim seeks recovery for allegedly libelous activity, which is not within the ambit of prima facie tort. In addition, CP argues that plaintiff's state civil rights claim fails because the statute at issue does not reach newspaper publication, and that many of plaintiffs' defamation claims are time-barred.

I. *12(b)(6) Standard*

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under *Fed.R.Civ.P. 12(b)(6)*, a court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 534 (2d Cir.1999)*. Dismissal is proper "only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Scotto v. Almenas, 143 F.3d 105, 109-10 (2d Cir.1998)* (quoting *Branham v. Meachum, 77 F.3d 626, 628 (2d Cir.1996)*).

II. *Civil Rights Conspiracy under 42 U.S.C. § 1985(3)*

Defendants argue that plaintiffs' civil rights conspiracy claim, brought pursuant to *42 U.S.C. § 1985(3)*, should be dismissed as a matter of law because plaintiffs (i) fail to plead a conspiracy or meeting of the minds; (ii) fail to show that any alleged interference with a federal right was the result of state action; and because (iii) a predicate violation of state law, namely *New York State Civil Rights Law § 40-c*, cannot provide the basis for a federal civil rights conspiracy.

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To state a cause of action under the deprivation clause of *§ 1985(3)*, a plaintiff must allege (1) a conspiracy, (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States. *Thomas v. Roach, 165 F.3d 137, 146 (2d Cir.1999). Section 1985(3)* provides no substantive rights itself; rather, it merely provides a remedy for violation of the rights it designates. *Great Am. Fed. Sav. & Loan Assoc. v. Novotny, 422 U.S. 366, 372, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979)*. As a result, to maintain a claim pursuant to *§ 1985(3)*, there must be some predicate constitutional right which the alleged conspiracy violates. *See id.* at 376, *99 S.Ct. 2345; see also Emanuel v. Barry, 724 F.Supp. 1096, 1100 (E.D.N.Y.1989)*. In this case, plaintiffs allege that defendants engaged in a conspiracy to deprive them of their First Amendment rights to freedom of religion and association.[2]

1. *Conspiracy*

42 U.S.C. § 1985 creates a federal cause of action against persons who conspire to interfere with the civil rights of another. *See 42 U.S.C. § 1985*. Conspiracy is an essential element of a claim under *42 U.S.C. § 1985. Thomas, 165 F.3d at 146*. To properly allege a conspiracy claim, the

2. Plaintiffs appear to have initially alleged in their amended complaint a *§ 1985(3)* violation based on a conspiracy to deprive them of their civil rights pursuant to *New York Civil Rights Law § 40-c*. However, plaintiffs later argued that the claim under *§ 40-c* is a separate claim, and alleged only a conspiracy to deprive them of their First Amendment rights. Thus, the Court will not address the *§ 40-c* claim in the *§ 1985(3)* context.

complaint must contain specific factual allegations. "A complaint consisting of nothing more than conclusory or vague allegations of conspiracy is insufficient to survive a motion to dismiss." *Vertical Broad., Inc. v. Town of Southampton, 84 F.Supp.2d 379, 389-90 (E.D.N.Y.2000); see also Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.1983)* (holding that conclusory, vague, or general allegations of a conspiracy cannot survive a motion to dismiss).

Here, the complaint does not include any facts that could support an inference of a conspiracy among the various defendants. Instead, plaintiffs rely on conclusory allegations of concerted action. Plaintiffs cite no facts from which a meeting of the minds could be inferred. Simply alleging that the defendants published defamatory articles at the same time is not enough to state concerted action. Plaintiff's *§ 1985(3)* claim thus fails for failure to adequately plead a conspiracy.

2. *State Action*

Plaintiffs' *§ 1985(3)* claim fails, however, for a more fundamental reason. Here they rely on the deprivation clause of *§ 1985(3)* to allege that defendants influenced the state to deprive them of their rights under the First Amendment. (*See* Am. Compl. ¶ 98.) Plaintiffs readily concede that they do not claim any state involvement in the alleged conspiracy. (*See* Tr. of Oral Arg., Feb. 11, 2003.) This concession is fatal to their claim.

In *United Brotherhood of Carpenters v. Scott*, the Supreme Court held that when an alleged *§ 1985(3)* conspiracy is charged as violating First Amendment rights,

no cause of action exists "unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state." *463 U.S. 825, 830, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983).* Plaintiffs in this case appear to be relying on the language in *Carpenters* suggesting that it is enough for a private conspiracy to "influence" state activity.

Since the decision in *Carpenters*, however, the Supreme Court has made it plain that there is no viable claim under the deprivation clause of *§ 1985(3)* for a private conspiracy aimed at rights that are protected only against state encroachment. In *Bray v. Alexandria Women's Health Clinic*, the Court held that the deprivation clause of *§ 1985(3)* does not apply to private conspiracies aimed at a right protected *only* against state interference. *506 U.S. 263, 278, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).* The right to free speech under the First Amendment is indisputably such a right. *See id.* Plaintiffs reliance on *New York State NOW v. Terry, 886 F.2d 1339, 1360 (2d Cir.1989)* for the proposition that a *§ 1985(3)* cause of action may lie even when a plaintiff is injured by a purely private conspiracy is misplaced. *New York State NOW* stands for the proposition that no state action is required in a *§ 1985(3)* claim when the conspiracy is predicated on the violation of a constitutional right that is subject to both private and public encroachment, such as the right to interstate travel. As stated before, rights under the First Amendment are not rights that are subject to private encroachment, and *New York State NOW* is therefore not relevant.

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In an effort to salvage their claim, plaintiffs allege for the first time in their brief that they are relying on that clause of *§ 1985(3)* which provides a cause of action against those who conspire to "prevent[ ] or hinder [ ] the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws. . . ." *42 U.S.C. § 1985(3)*. As an initial matter, this Court notes that plaintiffs may not raise a claim in a brief that is not set forth in the complaint to avoid dismissal. *See Friedl v. City of New York, 210 F.3d 79, 83-84 (2d Cir.2000)* ("A district court errs when it . . . relies on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss.").

Even if the plaintiffs moved to amend their complaint to allege a violation of the hindrance clause, this claim would fare no better. First, it is an unsettled question whether the hindrance clause of *§ 1985(3)* can be applied to wholly private conspiracies aimed at rights protected only against official encroachment. The majority opinion in *Bray* left that question open, but suggested in dictum that a state action requirement would apply to the hindrance clause as well. *See Bray, 506 U.S. at 282-83, 113 S.Ct. 753.*

Since *Bray*, appellate courts appear divided on the issue. *See Tilton v. Richardson, 6 F.3d 683, 687 (10th Cir.1993)* (holding that claims under the hindrance clause must be based upon rights protected against both private and official interference); *but see Libertad v. Welch, 53 F.3d 428, 449-50 (1st Cir.1995)* (holding that claims brought under the hindrance clause do not require a state actor be involved in the conspiracy, even if the right interfered with is protected only against state encroachment).

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The Second Circuit does not appear to have addressed this issue since *Bray*. In a pre-*Bray* case, the Circuit held that state action was not required to state a colorable claim under the hindrance clause. *See Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir.1982)*. It is unclear what position the Circuit would take after *Bray*.

In any event, the Court need not resolve that issue here. Even if one concludes that *§ 1985(3)* prohibits wholly private conspiracies whose aim it is to hinder or prevent state authorities from securing constitutional rights of its citizens, the facts as alleged fail to make out such a claim. Plaintiffs point only to a series of newspaper articles that portray Falun Gong practitioners in an exceedingly bad light, and then reference the fact that there was a denial of a parade permit. There are no allegations that the articles advocated that plaintiffs be denied any First Amendment rights or that there was a correlation between the articles and the denial of the permit. Even if there were such a correlation, the fact that public officials might be "influenced" to act based upon press reports hardly rises to the level of hindering or preventing. To extend the limits of *§ 1985(3)* to cover every case in which an argument could be made that press reports, even libelous press reports, have influenced the decision-making of state officials would be to turn *§ 1985(3)* into the generalized federal tort law that it was clearly not intended to be. *See Bray, 506 U.S. at 269, 113 S.Ct. 753.*

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II. *Subject Matter Jurisdiction*

Plaintiffs' complaint alleges only one cause of action sufficient to invoke this Court's federal jurisdiction, namely the aforementioned § 1985(3) civil rights conspiracy. Because that claim has been dismissed, this Court must address whether it can or should exercise its supplemental jurisdiction under *28 U.S.C. § 1367(a)* to decide plaintiffs' remaining state law claims. Federal courts with jurisdiction over claims that raise a federal question may also exercise supplemental jurisdiction over all other claims that are "so related" as to form part of the same case or controversy. *See 28 U.S.C. § 1367(a)*. State law claims form part of the same case or controversy when they "derive from a common nucleus of operative fact" and are such that one would ordinarily expect them to be tried together. *People by Abrams v. Terry, 45 F.3d 17, 23, n. 7 (2d Cir.1995)* (quoting *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)*).

In deciding whether to exercise supplemental jurisdiction, the Court should consider whether such an exercise is justified by the interests of judicial economy, convenience, fairness to litigants, and comity. *See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)*. Where all federal claims have been dismissed before trial, these factors "point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* However, circumstances may arise that warrant the retention of jurisdiction. Such circumstances include (i) if the outcome of the claim is plain or (ii) if the outcome of the state law claim turns on federal law.

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See Waterman v. Transport Workers' Union Local 100, 8 F.Supp.2d 363, 369 n. 2 (S.D.N.Y.1998).

The Court chooses to exercise its supplemental jurisdiction in favor of deciding plaintiffs state law claims because the claims arise out of the same underlying facts, and the outcome of these claims is "plain." *See Id., 8 F.Supp.2d at 369 n. 2.* ("One reason to retain jurisdiction is if the outcome of the claim is plain. In this situation, considerations of judicial economy [warrant] retention and decision rather than relinquishment of the case to the state court." (internal quotations omitted)).

III. *State Law Claims*

A. *Defamation*

Defendants argue that plaintiffs' defamation claim must be dismissed because plaintiffs fail to show that defendants' statements are "of and concerning" the plaintiffs and, thus, are barred by the "group libel doctrine," and because the defendants' statements are statements of opinion, not actionable statements of fact. Plaintiffs argue, however, that the group libel doctrine is not a *per se* bar to a successful defamation claim and, as a result, their defamation claim should survive a motion to dismiss. Because it is plain to the Court that the defendants' statements are barred by the group libel doctrine, plaintiffs' defamation claim is dismissed.

A claim for defamation is actionable under New York law if the defendant made (i) a false and (ii) defamatory (iii) statement of fact (iv) of and concerning the plaintiff

(v) with the required degree of fault and (vi) special damages or per se liability. *See Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 176 (2d Cir.2000).* However, under the "group libel doctrine," a plaintiff's defamation claim is "insufficient if the allegedly defamatory statements referenced the plaintiff solely as a member of a group." *Abramson v. Pataki, 278 F.3d 93, 102 (2d Cir.2002)* (quoting *Church of Scientology Int'l v. Time Warner, Inc., 806 F.Supp. 1157, 1160 (S.D.N.Y.1992)*); *see also Provisional Gov't of Republic of New Afrika v. Amer. Broad, Cos., Inc., 609 F.Supp. 104, 108 (D.D.C.1985)* (noting that defamation is personal such that statements which refer to an individual do not implicate the organization of which plaintiff is a member while statements which refer to an organization do not implicate its members). In order to overcome the group libel doctrine, a plaintiff must demonstrate that "the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member." *Church of Scientology, 806 F.Supp. at 1160* (quoting *Restatement (Second) of Torts, § 564A(b)*).

In this case, plaintiffs cannot demonstrate that any of the defendants' allegedly defamatory statements reasonably give rise to the conclusion that they particularly reference any of the plaintiffs, either as members of the group or an identifiable sub-group. Not one of the statements contained in plaintiffs' amended complaint references either the "Friends of Falun Gong" or any of the 67 individually-named plaintiffs. Further, plaintiffs' position that they constitute a "discrete, readily identifiable sub-grouping of Falun Gong practitioners located within the New York metropolitan area" (*see* Am. Compl. ¶ 15) fails to save their claim, as defendants' allegedly defamatory statements at most reference "New York

based Falun Gong practitioners," a group that far exceeds the particular plaintiffs.[3]

Plaintiffs nevertheless contend that their defamation claim should not be dismissed because the allegedly defamatory statements need not reference plaintiffs by name. To support that position, they principally rely on *Church of Scientology Int'l v. Time Warner, Inc.* In *Church of Scientology*, the plaintiff, Church of Scientology International ("CSI") brought a defamation suit for the alleged damages it suffered from a *Time magazine article entitled "Scientology: the Cult of Greed." 806 F.Supp. at 1158.* In that case, the plaintiff's complaint set forth six purportedly defamatory statements, none of which explicitly referenced CSI. However, the article featured a photograph of CSI, with a caption stating "Church of Scientology International headquarters, Los Angeles." *Id.* at 1161. The court found that references in the *Time* article to the "Church of Scientology," "the church," and to "the Los Angeles-based church" could reasonably be understood to refer to the plaintiff, "given CSI's capacity as 'Mother Church,' the hierarchical structure of Scientology, and the caption of the photograph identifying CSI's headquarters as being located in Los Angeles. . . ." *Id.*

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3. Defendants contend that there are millions of Falun Gong practitioners worldwide, and over one thousand New York based practitioners. Plaintiffs do not offer alternative numbers in response. Instead, plaintiffs respond by arguing that the actual number of group members alone is insufficient to bar a defamation claim and, further, that the individual plaintiffs need not be named. Although, both of plaintiffs contentions are correct, they set forth no viable legal argument to overcome the hurdle that their sheer numbers present, and no reason to believe that the particular plaintiffs in this case were identifiable within the group of New York based practitioners.

By contrast, the court found that any reference to "Scientology" or to acts of individual Scientologists could not be ascribed to CSI and, thus, were not actionable under the group libel doctrine. The court found that "[w]ithout more, reference to the activities of individual Scientologists can not create a right of action in CSI." *See id.* Plaintiffs' position here is akin to CSI's position with regard to the references to "Scientology." The court in *Church of Scientology* found that there were hundreds of other Scientology entities, and therefore a reference to "Scientology" in general could not be found to be "of and concerning" the plaintiffs. *See id.* Likewise, a reference to Falun Gong members cannot be said to reference either the individual plaintiffs or Friends of Falun Gong, given the number of Falun Gong practitioners and organizations. Plaintiffs' position is clearly distinguishable from CSI's position with regard to references to the "church," or the "Los Angeles-based church." Insofar as plaintiffs are claiming that they are the "equivalent" of the Los Angeles Scientology chapter, as the readily identifiable and official non-profit Falun Gong organization registered with the State of New York, they do not allege sufficient facts to demonstrate that references to the group as a whole could be attributed to plaintiffs. Although there are a few references to activities that take place in New York, there are no references to an organization of New York-based Falun Gong practitioners, or to any organization of Falun Gong practitioners at all.

Plaintiffs also rely on *Sovik v. Healing Network, 244 A.D.2d 985, 665 N.Y.S.2d 997 (N.Y.App.Div.1997)*, and this

reliance is equally misplaced. The plaintiffs in *Sovik*, an individual Hindu priest suing on behalf of all those similarly situated, and the Himalayan Institute of Buffalo, brought a defamation suit against The Healing Network for publishing a letter attributing sexual coercion of women to the teachings of the Himalayan Institute. *See id.* Although the letter at issue did not reference the individual named plaintiff, the court found that the statements sufficiently "of and concerning" the plaintiff to survive a motion to dismiss. *See id.* at 1000. The *Sovik* Court reached this conclusion because the individual plaintiff was one of only three Hindu priests in the United States, as well as the spiritual leader of the Himalayan Institute in Buffalo; he was one of 15 "senior teachers" in the United States; the allegedly defamatory statements were contained in a letter that was mailed to Institute members who would know the individual plaintiff as their spiritual leader, and the individual plaintiff was the only "senior teacher" located within a 300-mile radius of the Buffalo area. *See id.*

However, unlike the individual plaintiff in *Sovik*, who was an identifiable member of a small group of people, the individual plaintiffs here are 67 members of a significantly larger group. Further, plaintiffs are not "leaders" of the Falun Gong practice such that their identity is more readily discernible than the identify of a general group member. Accordingly, because plaintiffs cannot show that the circumstances of the defendants' allegedly defamatory publications reasonably give rise to an interpretation that they are "of and concerning" the plaintiffs, plaintiffs cannot

overcome the group libel doctrine and their defamation claim must be dismissed.[4]

B. *Prima Facie Tort*

Defendants argue that plaintiffs' prima facie tort claim must be dismissed because plaintiffs have simply restated their nonactionable defamation claim as a claim for prima facie tort. Plaintiffs contend that their claim is not a repetition of their defamation claim, but that the defendants have committed a prima facie tort by intentionally inflicting harm without any excuse or justification.

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4. Plaintiffs allege both defamation and defamation per se. New York recognizes certain statements as defamatory per se, meaning they are actionable without proof of special damages. *See Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163 (2d Cir.2000).* The plaintiffs contend that defendants have committed defamation per se by alleging that plaintiffs committed criminal activity, which has typically been considered a category of speech that falls into defamation per se. *See Liberman v. Gelstein, 80 N.Y.2d 429, 590 N.Y.S.2d 857, 605 N.E.2d 344, 348 (1992).* However, plaintiffs still must prove the other elements of defamation. The only requirement the plaintiffs need not fulfill in a defamation per se claim is proof of special damages. *See Shor Int'l Corp. v. Eisinger Enters., No. 90 Civ. 2353, 1993 WL 452546, *5 n. 1, 2000 U.S. Dist. LEXIS 17478, at *12 n. 1.* Because the plaintiffs have not even shown that the statements were "of and concerning" the defendants, as discussed above, the claim for defamation per se fail as well. Accordingly, plaintiffs' claim of defamation per se is dismissed.

Because plaintiffs' defamation claim is dismissed under the group libel doctrine, the Court need not reach defendants' additional argument that the claim should be dismissed because the allegedly defamatory statements are statements of opinion rather than fact.

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To support a claim for prima facie tort, plaintiff must prove the following four elements: (i) intentional infliction of harm, (ii) causing special damages, (iii) without excuse or justification, (iv) by an act or series of acts that would otherwise be lawful. *See Hughes v. Patrolmen's Benevolent Ass'n, 850 F.2d 876, 882 (2d Cir.1988)*; *Procter & Gamble Co. v. Quality King Distrib., 974 F.Supp. 190, 198 (E.D.N.Y.1997)*. "[I]t is well-settled that any claim that is covered by a traditional tort cannot be the basis for a claim of prima facie tort—even if the traditional tort claims turn out not to be viable." *Nevin v. Citibank, 107 F.Supp.2d 333, 346-47 (S.D.N.Y.2000)*.

This principle has been applied in the defamation context. In *Nat'l Nutritional Foods Ass'n v. Whelan, 492 F.Supp. 374, 383 (S.D.N.Y.1980)*, the plaintiffs, a trade association of retailers, manufacturers, and distributors in the health food industry, alleged a prima facie tort against the defendants. Plaintiffs claimed that the defendants intentionally and maliciously inflicted harm by engaging in a conspiracy to publish articles containing false and defamatory remarks about the plaintiffs. The Court dismissed the prima facie tort claim, holding that the specific acts charged were "recognized as tortious in the law as defamation, and therefore, the remedies lie only in the classic categories of tort." *Id.* (internal quotation marks and citation omitted). The Court dismissed the claim even though it found that the same acts did not amount to libel or defamation, finding that "[i]t would make no sense . . . to deem certain expressions immune from suit as libel, and then find them sufficient in the identical factual context to constitute a prima facie tort. . . ." *Id.* at 384.

Similarly, plaintiffs here cite no new facts in support of their prima facie tort claim. In fact, plaintiffs specifically claim that it is the publishing of the allegedly false and defamatory articles by the defendants that gives rise to their claim of prima facie tort. Because the only specific acts alleged by the plaintiffs are the exact same facts that failed as a defamation claim, plaintiffs' prima facie tort claim is dismissed.

C. *New York Civil Rights Law § 40-c*

Plaintiffs allege a violation of *New York Civil Rights Law § 40-c*, claiming that defendants discriminated against plaintiffs on the basis of religious belief. *Section 40-c* states: No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in *section 240.25 of the penal law*, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2003).

Plaintiffs claim that the defendants' articles caused the discrimination and/or harassment of the plaintiffs in violation of the *New York Civil Rights Law. Section 40-d* of the Civil Rights Law establishes the penalties for "[a]ny person who shall violate any of the provisions of the foregoing section . . . or who shall aid or incite the violation of any of said

provisions. . . ."[5] *N.Y. CIV. RIGHTS LAW § 40-d (McKinney 2003).*

While the plaintiffs' claim is not entirely clear from their pleadings, they seem to allege that the defendants' articles caused Falun Gong members to be excluded from certain parades in New York, thereby "aiding or inciting" discrimination on the basis of religious belief. However, plaintiffs allege no facts that tie the activities of the defendants to the denial of permits for the parades. Within plaintiffs' amended complaint, there are two references to articles published by defendant CP regarding the denial of parade permits to Falun Gong members. Both articles, however, were reporting a denial that had already occurred, rather than encouraging parade organizers to deny access to the Falun Gong.

Plaintiffs rely on *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, 968 F.2d 286 (2d Cir.1992)* as support for their claim. In *Jews for Jesus*, a resort cancelled its contract with Jews for Jesus after the Jewish Community Relations Council threatened that the Jewish community would boycott the resort if Jews for Jesus was allowed to use its facilities. The Second Circuit remanded the case to the district court, finding that the individual plaintiff could maintain an action under the New York Civil Rights Law if

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5. Plaintiffs cite *§ 41 of the Civil Rights Law* as the section which creates the private right of action against any person who violates *§ 40-c*. However, *§ 41* refers only to violations of §§ 40, 40-a, 40-b, or 42. *N.Y. CIV. RIGHTS LAW § 41 (McKinney 2003).* As plaintiffs cite only a violation of *§ 40-c*, *§ 40-d* is the applicable section here.

the plaintiff could show that "defendants aided or incited the [resort] to deny him accommodations directly or indirectly, for statutorily impermissible reasons." *Id.* at 294. Plaintiff's reliance on *Jews for Jesus* is misplaced for several reasons.

First, *Jews for Jesus* made clear that an organization cannot sustain a suit under this section. *Id.* at 293-94. *Section 40-c* provides that "no *person* shall . . . be subjected to any discrimination in his or her civil rights. . . ." *N.Y. CIV. RIGHTS LAW § 40-c* (emphasis added). In *Jews for Jesus*, the court held that "person" means "individual." *968 F.2d at 293*. Therefore, plaintiff Friends of Falun Gong, the entity, cannot maintain an action under *§ 40-c of the Civil Rights Law*.

Although the individually-named plaintiffs have standing to maintain an action under this section, their claim also fails, as they have failed to allege that they personally were discriminated against by the defendants. None of the sixty-seven individual plaintiffs allege that they personally were denied permission to march in a public parade. Instead, the amended complaint refers only to *Falun Gong* being denied access.

More to the point, plaintiffs' allegations do not sustain a showing that defendants' articles aided or incited Falun Gong's exclusion from the parade. In *Jews for Jesus*, the resort cancelled its contract with the plaintiff as a direct result of the threatened economic sanctions. Here, the only articles written by the defendants that reference the parades were written *after* Falun Gong had been denied permission to

march. Clearly, those articles were not the cause of Falun Gong's exclusion. In addition, as stated above, plaintiffs have not sufficiently alleged that any other articles, written before the parades took place, led to their exclusion.[6] Moreover, to find liability under this statute on the facts presented here would raise serious concerns as to the First Amendment rights of the defendants. *See Fed'n of Turkish-American Soc'ys, Inc. v. American Broad, Cos., 620 F.Supp. 56 (S.D.N.Y.1985).*

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6. Plaintiffs also cite no facts that would give rise to harassment within the meaning of *§ 40-c*. Harassment in this section is defined by *section 240.25 of the penal law*, which states:

> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.... *N.Y. PENAL LAW § 240.25* (Consol.2003).
>
> The plaintiffs allege that the defendants' articles have caused them to be inhibited from "freely practic[ing] their faith and associat[ing] without fear of verbal and physical reprisal." (Am.Compl.¶ 89.) However, they cite no facts alleging that anyone has physically threatened them at all, let alone threatened them as a result of the defendants' articles.

Plaintiffs, therefore, have not shown that they specifically have been discriminated against, or that the defendants' articles were the reason for any discrimination. *287 Therefore, plaintiffs' claim under *New York Civil Rights Law § 40-c* is denied.

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CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment in accordance with this Order and to close this case. SO ORDERED.